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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1409

TROY BARNETT,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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Petitioner Troy Barnett prays that a writ of certiorari issue to review the decision of the Supreme Court of Illinois denying petitioner leave to appeal from the judgment of the Appellate Court of Illinois affirming the trial court conviction of voluntary manslaughter. At the time of trial the defendant was 63 years of age. He was sentenced to a term of two to five years in the Illinois State Penitentiary and, after serving approximately five months of said sentence, defendant was enlarged on bail pending final review of this cause.

REFERENCE TO REPORTS OF OPINION.

People v. *Barnett,* 125 Ill. App. 2d 70, 260 N. E. 2d 303 (2nd Dist., June, 1970), is attached hereto as an appendix. Petition for leave to appeal denied by the Illinois Supreme Court on December 2, 1970. 46 Ill. 2d 507.

STATEMENT OF JURISDICTIONAL GROUNDS.

The decision of the Supreme Court of Illinois denying leave to appeal from the judgment of affirmance was entered on December 2, 1970. Jurisdiction of this Court is invoked under Title 28, U. S. C., Sec. 1257(3).

QUESTIONS PRESENTED FOR REVIEW.

I.

Did the judgment of affirmance by the Appellate Court of Illinois deprive petitioner of equal protection of the laws by denying him the right to assert the defense of justifiable use of force as heretofore recognized.

II.

Did the decision of the Appellate Court constitute a denial of due process of law by construing the Illinois manslaughter statute in such manner that its proscriptions were rendered vague, uncertain and meaningless.

CONSTITUTIONAL PROVISION INVOLVED.

FOURTEENTH AMENDMENT:

> ". . . nor shall any State deprive any person of . . . liberty, . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ILLINOIS STATUTE INVOLVED.

Illinois Revised Statutes, Chapter 38:

9-2(a) § 9-2(a) *Voluntary Manslaughter.*
A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

(1) The individual killed, or
(2) Another whom the offender endeavors to kill, but he negligently or accidently causes the death of the individual killed.

STATEMENT OF THE CASE.

The defendant, Troy Barnett, was 63 years old when charged with the fatal shooting of his wife on February 19, 1969. He surrendered himself into police custody on March 3, 1969, and was subsequently prosecuted in the Circuit Court of Lake County, Illinois, on an indictment for murder and voluntary manslaughter.

The deceased, Lola Barnett, lived together with the defendant and her 15 year old daughter in an apartment located in the City of North Chicago. (A. 11.) Though the deceased had filed for divorce in November, 1968, at the time of fatal incident there had been a reconciliation. (A. 15.)

In the late afternoon of February 19, 1969, the daughter arrived home to find the deceased and the defendant engaged in an argument. (A. 12.) She witnessed no blows struck by either side, but heard her mother order the defendant to leave the house. (A. 12.) When the defendant refused, claiming he had no place to go, the deceased removed his ties from behind the bedroom door, threw them on the floor and went into the dining room. (A. 12.)

Several minutes passed, and upon hearing a gunshot, the daughter ran to the front door. (A. 12.) She did not witness the shooting and as she fled the apartment she heard two more shots fired. (A. 12.) She further testified that the mother had told her that she kept a gun under her pillow for purposes of protection. (A. 13.)

The defendant testified that he was alone with the deceased when the fatal shots were fired. As he entered the dining room the deceased continued to upbraid him. She threatened to throw him out and (A. 18):

> "At that time she came out of her bosom with a pistol and I rushed at her. I was too close to her; I couldn't get out of the door, so I rushed at her. As I rushed at her I grabbed her hand. I was right up to her. The gun was in her right hand and it went off. The bullet hit the wall behind me. We just kept scuffling and I heard the gun go off again. It went off twice. I was right up to her, trying to hold the gun away from me when the gun went off. I was holding onto her hand. She had her hand on the trigger. When the gun discharged the third time, she weakened. I took the gun out of her hand and ran. At no time prior to those shots being fired or while they were being fired did I have my hand or finger on the trigger."

The defendant's testimony concerning the close range from which the gun was fired was corroborated by the pathologist. He testified that the presence of powder burns on the face of the deceased indicated that one shot was fired from a distance of 12 to 18 inches from contact. In addition, an investigating officer testified that the police had located a bullet hole in the door leading from the dining room and extracted the bullet from the wall. (A. 13.)

At the conclusion of the evidence, the prosecution submitted an instruction and verdict forms for voluntary manslaughter. Though defense objected contending that there was no evidence to support such a verdict, the court al-

lowed the issue of voluntary manslaughter to be placed before the jury. (A. 19.) The defendant was found guilty of voluntary manslaughter and was subsequently sentenced to the Illinois State Penitentiary for a term of two to five years. (A. 9.)

The federal questions sought to be reviewed herein were first raised by the decision of the Appellate Court of Illinois entered on June 16, 1970, affirming defendant's conviction below. A petition for rehearing was filed within the time prescribed by the rules, and was denied on July 30, 1970. Review was then sought in the Supreme Court of Illinois through a petition for appeal as a matter of right, and said petition was denied on December 2, 1970.

ARGUMENT IN SUPPORT OF THE WRIT.

I.

Petitioner Was Deprived of Equal Protection of the Laws Where, by the Action of the Reviewing Court, He Was Denied the Right to Assert the Defense of Justifiable Use of Force as Heretofore Recognized.

The opinion of the Appellate Court, as well as the record below, recognizes that the issue of self-defense had been interposed by the defendant. His testimony clearly established that at the time the deceased assaulted him, the defendant was within such close proximity to his assailant that he had no alternative but to rush her and grab her hand in an attempt to protect himself. (A. 18.)

Ignoring defendant's contention that his reaction to the deadly assault amounted to a deliberate act of self-defense, the Appellate Court adopted the unwarranted presumption that the killing of the aggressor occurred while the accused

was acting under a sudden and intense passion. However, nowhere in the opinion does the Court indicate the factual basis for this presumption.

Implicit in the holding of the Appellate Court is the determination that it was the defendant who was the victim of the initial deadly assault. Ironically, after making this finding of fact, the Court then concluded as a matter of law that the defendant's response to the assault was not what he declared it to be—a deliberate act of self-defense.

It is manifest from this decision that the State of Illinois has unequivocally deprived petitioner of his right to equal protection of the law. In the case at bar the defendant was prosecuted on an indictment charging murder and voluntary manslaughter. In response to these charges he pled self-defense and, in support thereof, evidence was introduced that was unrebutted by the prosecution.

The right to assert this defense is a right that is not only deeply embedded in the common law, IV Blackstone, Commentaries 183 (1769), but one that has been implemented by the state legislature as an expression of public policy. Ill. Rev. Stat. (1967) ch. 38, § 7-1.

Moreover, in Illinois, justifiable use of force is an affirmative defense, Ill. Rev. Stat. (1967), ch. 38, § 7-14, and once this issue is raised, until now it has been the duty of the prosecution to prove the defendant guilty beyond a reasonable doubt as to that issue together with all the other elements of the offense. Ill. Rev. Stat. (1967), ch. 38, § 3-2; *People* v. *Brown*, 78 Ill. App. 2d 327, 223 N. E. 2d 311 (1st Dist. 1966).

In *People* v. *McMurry*, 64 Ill. App. 2d 248, 212 N. E. 2d 7 (2nd Dist. 1965), as in the case at bar, the sole testimony describing the fatal encounter came from the lips of the defendant. There he testified that during a quarrel over money, the victim assaulted him with a knife, a struggle

ensued and the fatal stabbing resulted. Based upon the foregoing set of facts, this same Appellate Court, in 1965, concluded on page 251:

> "There simply is no evidence in this record that the defendant was acting under an intense passion caused by the kind of provocation contemplated by the statute. This is true on either version of the facts. If the defendant's own account be credited, he was not reacting in anger but was attempting to defend himself."

Ironically, in the case at bar the court did indeed credit the defendant's own account of the fatal struggle. Yet in reviewing this conviction, for no apparent reason the court refused to give force and effect to its prior holding and determined the defendant's response to be a killing under a sudden and intense passion. Moreover, in making this determination the court deprived petitioner of the benefit of those decisions which had construed similar conduct as deliberate acts of self-defense.

The court chose to ignore *People* v. *Hall,* 118 Ill. App. 2d 160, 254 N. E. 2d 793 (1st Dist. 1969), which involved a prosecution under an indictment for murder. There the evidence disclosed that the defendant and his wife were assaulted with a deadly weapon while patronizing a cleaning establishment. Defendant managed to escape and returned immediately with a gun ordering the assailant to drop her weapon. Instead, she shot at the accused and he killed her in a return of fire. In *Hall,* as in the instant case, the defendant was found guilty of voluntary manslaughter, but on review the court reversed the conviction, observing on page 168:

> ". . . we are of the opinion that the court improperly submitted the issue of voluntary manslaughter to the jury, because the evidence cannot be considered as creating a heat of passion situation that justified such

> a verdict. . . . This record presents a situation of either guilty of murder or a finding of innocence by reason of self defense."

The court further disregarded *People* v. *Brown*, 78 Ill. App. 2d 327, 223 N. E. 2d 311 (1st Dist. 1966). There the victim was living common law with the defendant's mother. Upon discovering that the accused had told his mother of certain infidelities, the deceased attacked with what the defendant assumed to be a knife. The accused grabbed a hatchet and struck the fatal blow. In reversing the defendant's conviction for voluntary manslaughter, the court concluded that facts as recited clearly established a case of self-defense rather than a killing committed under sudden and intense passion.

Finally, in affirming this conviction the court paid scant attention to the pronouncement made in *People* v. *Lewellen*, 43 Ill. 2d 74, 250 N. E. 2d 651 (1969). There, as in the case at bar, the defendant alone testified to the fatal strugge. Further, in *Lewellen*, as here, the accused's version was not contradicted by the medical findings. In reversing, the court was mindful of the State's concession that the conviction for manslaughter could not stand if the defendant's version were taken to be true. Yet, in the instant case, though the court conceded that the defendant's version was true, it refused to interpret that finding in a manner that was consistent with the holding in *Lewellen*, as well as with the hypothesis of innocence customarily followed in similar fact situations.

II.

The Construction Placed Upon the Voluntary Manslaughter, by the Court of Review, Renders Its Proscriptions Vague, Uncertain and Meaningless, and Thus Constitutes a Denial of Due Process of Law.

Petitioner's conviction below is bottomed upon the Illinois voluntary manslaughter statute. Ill. Rev. Stat. (1967), ch. 38, § 9-2 (a). That enactment provides:

> "A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:
>
> (1) The individual killed, or
>
> (2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed."

Fundamental fairness requires that a criminal statute may not rest upon an uncertain foundation. It is elementary that a statute which forbids the doing of an act in terms so vague that men of common intelligence most necessarily guess at its meaning and differ as to its interpretation, violates the first essential of due process of law. *Lanzetta* v. *New Jersey,* 306 U. S. 451.

In the case at bar the Appellate Court interpreted the applicable statute in a manner that offends the foregoing principle. It is evident from the record below that the defendant here was placed in a true dilemma. His assailant had drawn her weapon and the defendant had the misfortune to be on the receiving end. With all avenues of escape blocked he had no alternative but to employ deadly force in an effort to preserve his life.

It is apparent from the foregoing discussion that the construction placed on the manslaughter statute by the reviewing court has rendered its proscriptions vague, uncertain and meaningless. The import of this holding, when carried to its logical conclusion, precludes any persons similarly situated from ascertaining with any degree of certainty the standards to which their acts or conduct must conform.

Furthermore, by this decision the State of Illinois has given notice to those who may, on some future occasion, have need to avail themselves of the doctrine of self-defense. From the pronouncement of the court below the message is unmistakably clear. Where in a given case the evidence establishes an unprovoked deadly assault upon an individual, and that person kills his assailant while endeavoring to preserve his life, the result will now be manslaughter. Error is further compounded by the court's willingness to construe the victim's initial act of aggression as the element of provocation necessary to support a conviction for manslaughter.

What remains in the State of Illinois for persons similarly situated to petitioner is tantamount to a Hobson's Choice. The net result of this holding requires the defendant to either stand his ground and absorb the full measure of his assailant's thrust; or repel the assault and suffer the conviction which has been affirmed below. A choice between two evils of such considerable magnitude can hardly be said to be any choice at all.

We therefore urge this judgment to be reviewed on a writ of certiorari.

CONCLUSION.

The petitioner prays that your Honors will consider his complaint to be of sufficient magnitude to warrant this Court's review. From the foregoing recitals it is petitioner's belief that substantial questions of constitutional dimension have been raised warranting consideration by this Court.

Respectfully submitted,

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APPENDIX.

OPINION OF APPELLATE COURT OF ILLINOIS.

MR. JUSTICE ABRAHAMSON Delivered the Opinion of the Court.

The defendant, Troy Barnett, was prosecuted in the Circuit Court of Lake County on an indictment for murder and voluntary manslaughter. The jury returned a verdict finding him guilty of voluntary manslaughter and he was sentenced by the court to a term of two to five years imprisonment. Defendant moved for a new trial alleging, among other things, that the issue of voluntary manslaughter was not properly raised, and that he was either guilty of murder or was innocent under the law of self defense. This motion was denied and defendant appeals to this court.

Defendant and the decedent, his wife Lola, lived together with her 15 year old daughter, Patricia Grier, in an apartment in North Chicago. Their domestic life was far from tranquil. In fact, decedent had filed a complaint for separate maintenance, or, in the alternative, divorce, on November 29, 1968. However, they had become reconciled. According to the testimony of Patricia, they argued and disagreed a good bit of the time, but never exchanged physical blows. On the evening of February 19, 1969, they were arguing when decedent threatened to throw defendant out of the home and said she "didn't have to have a man beat on her." Patricia said defendant appeared to have been drinking that evening. Decedent went into the bedroom and threw defendant's ties on the floor in his presence and pushed a portable TV toward him, and then went into the

dining room. Shortly afterward, Patricia said, she heard three shots, whereupon she left the home and went to a relative's home. She did not witness the shooting.

Defendant testified that he had purchased a .38 Smith & Wesson revolver in November of 1968, and had given it to decedent. It was a five shot revolver. The cylinder revolves when the trigger is pulled. The hammer has to be cocked each time it is fired, or the trigger has to be pulled all the way back so that the hammer will come back and fall on the cartridge to fire the shot. The empty casings remain in the revolver. Defendant testified that he had not been drinking that evening. During the disagreement between them, he went into the dining room where decedent continued to upbraid him; she said she was not joking and threatened to throw him out; that "she came out of her bosom with a pistol" and that he was too close to her to get out of the door, so he rushed at her, and grabbed her hand. The gun was in her right hand and it went off, the bullet hitting the wall behind him. They continued scuffling and the gun discharged two more times. He was holding on to her hand, her finger was on the trigger, when the gun was discharged. After the third shot, she weakened; he took the gun from her and fled. He surrendered to the police on March 3, 1969. He stated that he did not attempt to kill his wife.

A qualified pathologist, who performed the autopsy on decedent, testified that powder burns indicated one shot was fired at close range, 12 to 18 inches, from decedent's face entering the left cheek and ultimately lodging in the carotid sheath, which is composed of connective tissue enclosing large vascular structures, different portions of which are essential to life. The other bullet entered the right chest piercing the upper and lower lobes of the right lung. In his opinion either wound could have been fatal.

The superintendent of the Bureau of Criminal Investigation for the State of Illinois identified the spent bullets introduced in evidence as being from the same .38 Smith & Wesson revolver. The clothing worn by decedent when she was shot was badly decomposed, but he estimated from an examination of the clothing, that the gun was at a "distance greater than contact" when the shot was fired that entered her chest.

The issue here is whether the facts adduced at the trial pertaining to "sudden and intense passion resulting from serious provocation" warrant the submission to the jury of an instruction and verdict form of voluntary manslaughter. Defendant argues that as a matter of law the evidence did not warrant the submission of such an instruction and verdict form. To the contrary, the State submits that the totality of the evidence presented must be considered, and where the evidence would permit the jury to find the defendant guilty of manslaughter, it is not error for the trial court to give instructions and verdict forms on manslaughter.

Voluntary manslaughter is committed by a person "if at the time of the killing, he is acting under a sudden and intense passion resulting from serious provocation", and serious provocation is defined as "conduct sufficient to excite an intense passion in a reasonable person". Ill. Rev. Stat. 1967, ch. 38, sec. 9-2(a). Defendant contends that mere words are insufficient to evidence serious provocation. *People* v. *McMurry*, 64 Ill. App. 2d 248, 251. With this the State agrees, but avers the factual situation here presented not only a vocal argument, but an act of serious provocation, culminating in the decedent threatening to throw the defendant out of the home and drawing a gun and pointing it at him. Just prior to these acts, she had thrown his ties on the floor, shoved a television set at him, and cursed him. There is no time interval between decedent's drawing the

gun from her person and pointing it at the defendant; immediately he rushed her and a violent struggle ensued. We cannot agree with the defendant that these facts support his contention that there was no serious provocation making a voluntary manslaughter instruction improper.

Defendant also states that mere gestures cannot support a conviction of voluntary manslaughter. *The People* v. *Washington,* 27 Ill. 2d 104, 109, but we consider drawing a pistol and pointing it at defendant more than a mere gesture.

During the trial the defendant pleaded self defense and claims that he was either guilty of murder or innocent by reason of self defense. He relies upon *The People* v. *Newman,* 360 Ill. 226, 231, in which the court held there was insufficient evidence to support a conviction of manslaughter since the evidence admitted of but one of two conclusions—either the defendant was guilty of murder, or innocent under the law of self defense. However, in *Newman,* the evidence showed a lapse of time between the provocation and the killing. Defendant also relies on *The People* v. *Smith,* 404 Ill. 350, 354, where it was held there was an improper conviction for manslaughter. In that case the court held that the facts revealed that the use of a crank by the defendant was not the result of a sudden impulse of passion, but was a deliberate act of self defense at a time when defendant was being assaulted.

The general rule as to what constitutes voluntary manslaughter is stated in the *Smith* case as follows, p. 354:

> "In cases of voluntary manslaughter, there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing. The killing must be the result of that sudden, violent impulse of passion supposed to be

> irresistible; for if there should appear to have been an interval between the assault or provocation given and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and punished as murder."

It seems clear that the rapid sequence of events in the case before us precludes any interval sufficient for the voice of reason to be heard, or an act of deliberate revenge, and qualifies as a sudden impulse of irresistible passion.

Defendant also cites the recent case of *People* v. *Hall,* 118 Ill. App. 2d 160, but that is not analogous to this case. The factual situation there did not create a heat of passion situation, but rather a situation of either guilty of murder or a finding of innocence by reason of self defense.

The People v. *Taylor,* 36 Ill. 2d 483, 489, says: "It is only where the evidence establishes that the defendant is guilty of murder or is not guilty, as for example in cases in which the defense is alibi, or mistaken identity, that a defendant may be said to have a right not to have the jury charged as to lesser included offenses."

Having carefully considered all of the evidence, we cannot say that the defendant has the right here to have the jury determine whether or not he is guilty of murder and no other lesser offense. On the basis of the record it was not improper to submit to the jury an instruction and verdict form on voluntary manslaughter. Therefore, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

DAVIS, *P. J.* and SEIDENFELD, *J.*, concur.